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October 8, 1992

VIA FEDERAL EXPRESS

Chris Stubbs
South Coast Groundwater Section (H-6-4)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: **Response to Request for Information**
Fortin Industries
5428 Cleon Avenue
North Hollywood, California 91605

Dear Mr. Stubbs:

This letter constitutes a response to Keith Takata's letter dated April 13, 1992 concerning Westinghouse's June 1, 1992 response, on behalf of Fortin Industries, to USEPA's April 13, 1992 Request for Information relating to the "investigation of soil and groundwater contamination ... in the San Fernando Valley."

RESPONSE TO QUESTION 11

Initially, Westinghouse strongly disagrees with Mr. Takata's contention that Westinghouse's response to Question 11 is incomplete and that Westinghouse is therefore in violation of 42 U.S.C. Section 9604 with respect to such response. Mr. Takata identified only two purported deficiencies in Westinghouse's response: (1) Westinghouse's statement that "Westinghouse may have transported, used, purchased, generated, stored, treated, disposed or otherwise handled [certain] materials" is apparently considered insufficient because USEPA asked about which "hazardous materials [Westinghouse] actually did" transport, use, purchase, generate, store, treat, dispose or otherwise handle; and (2) "there was nothing in [Westinghouse's] response about the time period during

which each hazardous material was" transported, used, purchased, generated, stored, treated, disposed or otherwise handled. Neither position is correct.

First, Westinghouse's use of the word "may" in response to Question 11 is entirely appropriate, given the implications of the question. Question 11 is replete with legal conclusions, terms of art and technical distinctions, the evaluation of which should not be elicited from Westinghouse at the stated risk of constituting a false statement subject to potential criminal penalties. Furthermore, the specific subject matter of Question 11, i.e., the dispositive activity associated with every material handled by Fortin, is entirely irrelevant to the investigation of groundwater contamination in the San Fernando Valley. Rather, Westinghouse's response, which identifies those materials associated with the operation of the facility, is entirely sufficient for any reasonable inquiry by USEPA.

More importantly, however, Westinghouse has provided USEPA with a wealth of information responsive to Question 11. Westinghouse has identified more than 150 materials associated with the operation of the facility, identifying the manufacturer, chemical name and CAS number of the material. Westinghouse has provided Material Safety Data Sheets for most, if not all, of these materials. The MSDS's and the manufacturer listing provide the identity of the supplier of the materials. Westinghouse has identified the general storage methods associated with most of the materials, as well as the general use of the materials in the operation of the facility. Westinghouse has provided general disposal methods for the materials and has even provided annual throughput quantities. There is simply nothing more to add.

Second, Westinghouse directly addressed the time period during which such materials were transported, used, purchased, generated, stored, treated, disposed or otherwise handled. Westinghouse provided that such activities would have been within the "period of operation of the facility," which was identified as being 1967 until the present. Any further specificity is extremely difficult, perhaps impossible, insofar as historical records and knowledgeable employees are no longer available, and the difficulties associated with Question 11 are multiplied and magnified by any further chronological delineation.

Westinghouse also disagrees with Mr. Takata's implied assertion that CERCLA Section 104(e) authorizes the inquiry comprised by Question 11. CERCLA provides that "[t]he authority of this subsection [104(e)] may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this subchapter, or otherwise enforcing the provisions of this subchapter" 42 U.S.C. §9604(e) (emphasis added). The majority of the information solicited by Question 11, i.e., the disposition of hazardous materials by Fortin, does not impact

USEPA's determination of the need for a response action. For example, the presence, nature and extent of groundwater contamination in the San Fernando Valley is independent of the use of hazardous materials by Fortin. Furthermore, the disposition of hazardous materials by Fortin does not impact the choice or implementation of a response action. That determination is more appropriately dependent upon the presence, nature and extent of groundwater contamination. In addition, the level of detail contemplated by Question 11 is wholly unnecessary to the enforcement of Subchapter I of CERCLA. To the extent that USEPA has the authority to request information under Section 104(e), Westinghouse has clearly provided sufficient responsive information.

Furthermore, Congress certainly did not intend to abrogate the Constitution of the United States in enacting the provisions of CERCLA. Congress, the legislative branch of the United States, cannot, by the enactment of CERCLA, vitiate the due process provisions of the Constitution that are protected by the judicial branch of the United States. Nevertheless, USEPA has propounded the equivalent of a formal judicial discovery request in the guise of a legislatively-mandated information request, knowing full well that CERCLA matters often proceed to litigation. Consequently, Westinghouse has been forced to interpose judicially recognized objections to the request. Westinghouse must preserve each such objection to ensure that there has been no waiver of any objection should the matter ultimately come before a Court of competent jurisdiction.

The monumental administrative burden imposed by the ever-expanding scope of Information Requests propounded under Section 104(e) of CERCLA is an issue of significant concern to Westinghouse, as well as other companies. Westinghouse has been, and intends to remain, responsive to the needs of the USEPA in the implementation of CERCLA. However, Westinghouse cannot accept the proposition that CERCLA has provided USEPA with carte blanche.

In fact, Dr. Jack W. Fisch, Manager of Corporate Environmental Activities for Westinghouse, recently voiced this concern to Mr. William A. White, Esq., Enforcement Counsel for the Superfund Division of USEPA, who directly acknowledged the problem. By copy of this letter, as well as the Request for Information, Westinghouse is providing Mr. White with a clear example of the overreaching experienced by Westinghouse at the hands of USEPA.

CONFIDENTIALITY

Westinghouse has divested Fortin Industries and no longer has a claim of confidentiality to assert with respect to the response to the Request for Information. However, the purchaser may choose to maintain the confidentiality of the information provided by Westinghouse to USEPA. Unfortunately, Westinghouse has not been

able to raise this matter with the purchaser, and requests an additional two weeks to do so. Should the purchaser decide to maintain confidentiality, Westinghouse will work with the purchaser to respond to USEPA's questions in a timely manner. Please advise me at your earliest convenience if this approach is unacceptable to USEPA.

I trust that this letter adequately advises you of Westinghouse's position. If you have any questions or comments, please don't hesitate to contact me.

Very Truly Yours,



Thomas C. Gricks, III
Attorney

cc: W. A. White, USEPA
J. W. Fisch
P. K. Keenan, BALTIMORE